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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

EVEILIA PLANCARTE, **Plaintiff and Appellant,** **v.** **GUARDSMARK, LLC.,** **Defendant and Respondent.**	**A102152** **(Alameda County Super. Ct. No. H2187325)**

Plaintiff and appellant Eveilia Plancarte (Plancarte) appeals a summary judgment in favor of defendant and respondent Guardsmark, Inc. (Guardsmark) in her action for various tort causes of action based on the acts of Guardsmark employee Toufik Kadah (Kadah). She contends there are triable issues of fact concerning Guardsmark's knowledge of the foreseeability of Kadah's conduct and whether his conduct constituted negligence. She also contends the court abused its discretion in denying her motion for new trial.

BACKGROUND

Kadah's Employment by Guardsmark

Guardsmark is a security service company that contracts for the placement of private security guards. It first hired Kadah as a Guardsmark security guard in October 1997. Kadah left for personal reasons in December 1997 and was rehired in November 1998.

Guardsmark issued Kadah a "blazer uniform" to wear on the job. It consisted of a white shirt, necktie, navy blazer with a company patch, and gray slacks. Under the terms of his employment he was forbidden to carry a firearm or other weapon.

Until the incident that gave rise to this lawsuit, Guardsmark had not received any reports of inappropriate behavior by Kadah. It had only once removed him from an assignment after the corporate client complained his accent made him difficult to understand.

On March 9, 2000, Guardsmark assigned Kadah to an office building commonly known as 135 Commonwealth, the first day it was engaged to provide security services to the building.

Plancarte Action

Plancarte is an immigrant from Mexico who speaks limited English and does not read or write in any language. In her second and operative complaint against Kadah and Guardsmark she alleged generally: She worked as a janitor at 135 Commonwealth. At approximately 8:45 p.m. on March 9, 2000, she was cleaning a men's bathroom in the building when Kadah, wearing a "law enforcement type uniform" with a badge sewn on the chest, approached her and placed himself between her and the bathroom's exit so she could not leave. He violently grabbed her left breast with one hand while squeezing her face with the other. She was trapped for approximately ten minutes while he attempted to kiss her. When a woman knocked on the bathroom door, Kadah violently pushed Plancarte away into a wall. Plancarte escaped from the bathroom when the woman opened the door. Because her English is poor, Plancarte tried to tell the woman she had been sexually assaulted by using hand gestures. Kadah exited the bathroom and chased Plancarte through the building and down a stairway, where she fell.

Plancarte's complaint contained causes of action against Kadah only for assault, battery, false imprisonment, and intentional infliction of emotional distress based on these general allegations. It also contained a cause of action against Kadah only for negligence, alleging: (a) he knew or should have known she was cleaning the bathroom; (b) he "carelessly burst unannounced into the" bathroom and frightened her to such a degree she feared harm; (c) she fled the bathroom attempting to escape the danger she perceived from Kadah's abrupt and negligent behavior; (d) she sustained physical and emotional injuries as a result of his negligence.

Plancarte's complaint contained causes of action against Guardsmark titled "respondeat superior", negligent hiring, and negligent supervision. Her cause of action for respondeat superior alleged: a security company dresses its employees in law enforcement type uniforms to elicit the public's compliance to the authority they represent; a foreseeable consequence of security work in which an employee wears a law-enforcement type uniform is that the employee will take advantage of his perceived authority to assault members of the public; Kadah acted within the course and scope of his employment as a uniformed security guard for Guardsmark, making Guardsmark liable for all Kadah's acts and resulting damages alleged in the negligence, assault, battery and false imprisonment causes of action against Kadah.

Plancarte's causes of action for negligent hiring and supervision alleged: Guardsmark knew or should have know that Kadah was unfit to perform the duties for which he was employed and that employing him posed an undue risk to people like her because (a) Guardsmark's psychological testing of Kadah indicated he was deceptive and had engaged in deviant sexual behavior; (b) it did not sufficiently investigate his work experience; (c) it aided Kadah in cheating on the examinations necessary to qualify as a security guard; (d) it failed to supervise him adequately when it knew he was unqualified to act as a security guard.

Motion for Summary Judgment

Guardsmark moved for summary judgment on the grounds the alleged assault was not related to Kadah's employment and there was no evidence of negligent hiring or supervision.

Plancarte opposed the motion on the grounds there were triable factual issues as to whether it was foreseeable that Kadah would misuse his apparent authority as a security guard to assault her. Plancarte declared in support of her opposition that when Kadah came into the bathroom, she considered leaving but she thought she could trust him and had to obey him because he was wearing a uniform. She also supported her opposition with the deposition testimony of Kadah's supervisor, Christine Graves, who testified that,

in her experience, the public is socialized to associate a person wearing a uniform as having a position of authority or responsibility.

Plancarte also opposed the motion on the grounds there were triable factual issues as to whether some of Kadah's conduct was within the scope of his employment because, according to his version of their encounter in the bathroom, he acted negligently. She supported this opposition with the notes supervisor Graves took during her interview of Kadah after the incident and with the report of a private investigator Guardsmark hired to investigate the incident.

According to Graves's notes, Kadah scared Plancarte while she was cleaning the bathroom because he "burst" in "unexpectedly" to wash his hands. He told Plancarte not to worry. After washing his hands, he put his hand on her shoulder to calm her, telling her he was leaving. As he opened the bathroom door, a woman who worked in the building asked for assistance with a key. He helped the other woman with her key, then returned to the bathroom to calm Plancarte further and saw her running down the hall.

The private investigator's report of his interview with Kadah essentially accords with Graves's notes.

Plancarte further opposed the motion on the grounds there were triable issues of fact regarding the negligent hiring and supervision causes of action in light of the evidence of Kadah's untrustworthiness. She supported her argument with evidence that Kadah does not speak English, contrary to a Guardsmark requirement; he initially claimed to be a United States citizen on his job application, but later, with Graves's assistance, corrected his status to resident alien ; he has two social security numbers ; his 1997 and 1998 job applications contained discrepancies in the information about his wife; he sought unemployment benefits in 1998 before returning to his Guardsmark job claiming he had been "laid off," although he left voluntarily; his psychological test was flagged for retesting; and his test answers suggested lawlessness and sexual deviancy.

The court entered judgment for Guardsmark after granting its motion.[1] Plancarte's motion for new trial based on newly discovered evidence was denied. This appeal followed.

DISCUSSION

Standard of Review

Motions for summary judgment are properly granted if all papers submitted show there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must negate a necessary element of each of the plaintiff's causes of action or establish a complete defense thereto. (Code Civ. Proc., § 437c, subd. (n); *McManis v. San Diego Postal Credit Union* (1998) 61 Cal.App.4th 547, 555.) Once the defendant makes such a prima facie showing, the burden shifts to the plaintiff to show that a triable issue of material fact exists within the framework of the issues as fixed by the pleadings. (Code Civ. Proc., § 437c, subd. (*o*)(2); *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 122 (*Lowe*).)

Summary judgments are reviewed de novo, pursuant to the same statutory procedure followed in the trial court. (*Lowe, supra*, 56 Cal.App.4th at p. 121; *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 629.)

Respondeat Superior Doctrine and Intentional Torts

Under the doctrine of respondeat superior, an employer is vicariously liable for the torts of its employees committed within the scope of that employment. (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296 (*Lisa M.*).) This doctrine may apply to an employee's willful, malicious or criminal torts, even if not authorized by the employer. (*Id*. at pp. 296-297.) However, the employer will not be held liable for an intentional tort, such as an assault, that did not have a causal nexus to the employee's work. (*Ibid*.)

The accepted test for determining the requisite causal nexus asks if the tortious occurrence was a generally foreseeable consequence of the employment activity, so that

[1] The action continues against Kadah.

"'in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.' [Citations.]" (*Lisa M., supra*, 12 Cal.4th at p. 299.) This test reflects the justification for respondeat superior liability: losses fairly attributable to the employer's enterprise--those which foreseeably result from the conduct of the enterprise--are allocated to the enterprise as a cost of doing business. (*Ibid*.)

Generally, whether an employee has acted within the scope of employment is a question of fact. (*Lisa M., supra*, 12 Cal.4th at p. 299.) It becomes a question of law when the facts are undisputed and no conflicting inferences are possible. (*Ibid*.)

A sexual tort will not be considered a foreseeable outgrowth of employment "unless its motivating emotions were fairly attributable to work-related events or conditions." (*Lisa M., supra*, 12 Cal.4th at p. 301.) In *Lisa M*. an ultrasound technician was directed to conduct ultrasonic imaging examinations of a young pregnant woman injured in a fall. (*Id*. at p. 295.) After he performed the examinations, the victim accepted his offer to perform a test that would reveal the sex of her baby. Instead of performing the test properly, he molested her, falsely telling her that his acts were necessary for the test. (*Ibid*.)

Lisa M. concluded that the technician's "motivating emotions" were not "fairly attributable to work-related events or conditions." (*Lisa M*., *supra*, 12 Cal.4th at p. 301.) The technician "simply took advantage of solitude with a naïve patient to commit an assault for reasons unrelated to his work. [The technician's] job was to perform a diagnostic examination and record the results. The task provided no occasion for a work-related dispute or any other work-related emotional involvement with the patient. The technician's decision to engage in conscious exploitation of the patient did not *arise out of* the performance of the examination, although the circumstances of the examination made it possible. 'If . . . the assault was not motivated or triggered [] by anything in the employment activity but was the result of only propinquity and lust, there should be no liability.' [Citation.]" (*Ibid*., italics in original.)

Similarly here, nothing in the record indicates that the motivating emotions for Kadah's sexual assault on Plancarte were causally attributable to his employment as a security guard. (*Lisa M., supra*, 12 Cal.4th at pp. 301-302.) There was no evidence of a work-related dispute or emotional involvement between Kadah and Plancarte that motivated or triggered the sexual assault, such that the assault would be deemed engendered by events or conditions relating to his employment. (See *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1005-1006.) Nor is the business relationship between an office building security guard and the building janitor the type of relationship that would be expected to give rise to intense emotions, unilateral or mutual, which might predictably create a risk that the security guard would engage in sexual assaultive conduct. It is not, for example, akin to a physician or therapist who becomes sexually involved with a patient after mishandling the emotions predictably created by the therapeutic relationship. (*Lisa M., supra*, 12 Cal.4th at p. 303.) Rather, as a security guard in an office building, Kadah would be expected to have encounters with the building's janitorial staff that were no more than minimal, brief, and, at most, professionally courteous.

Kadah's sexual assault was also not foreseeable in the context of serving as a security guard. Of course it is foreseeable that a security guard may have occasion to make physical contact with people in or on the premises of the building. Guardsmark security guards are specifically authorized to touch people if necessary to protect themselves or others from physical harm. However, even when physical contact is always a necessary element of a job, e.g., doctor/patient, teacher/deaf and blind student, such permissive touching is insufficient to impose vicarious liability for deliberate sexual assaults. (*Lisa M., supra*, 12 Cal.4th at p. 302.)

Kadah's job was to protect the building and its authorized occupants against entry by unauthorized individuals. His assault of Plancarte cannot fairly be deemed attributable to any particular aspect of Guardsmark's business of providing security services. In fact, it was directly contrary to the job he was hired to perform. As a janitor employed to clean the building after normal working hours, Plancarte was among the

authorized building occupants Kadah was hired to protect from harm by intruders. His assault has no motivation that could be deemed an outgrowth of or generated by workplace responsibilities, conditions or events.

Plancarte relies on *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202 (*Mary M.*) to support her argument that Kadah's conduct was foreseeable. As she argues, it is not "so unusual or startling" that a security guard would misuse the apparent authority afforded by a uniform and badge for his personal advantage, and it is thus not "unfair" to include the loss resulting from his conduct among Guardsmark's costs of doing business. (*Lisa M., supra*, 12 Cal.4th at p. 299.)

In *Mary M*. a police officer detained the victim for erratic driving, drove her to her house in his patrol car, and raped her. (*Mary M*., *supra*, 54 Cal.3d at p. 207.) The Supreme Court concluded that the officer's assault was a generally foreseeable consequence of his position. "In view of the considerable power and authority that police officers possess, it is neither startling nor unexpected that on occasion an officer will misuse that authority by engaging in assaultive conduct. [¶] . . . [T]he very nature of law enforcement employment requires exertion of physical control over persons whom an officer has detained or arrested. The authority to use force when necessary in securing compliance with the law is fundamental to a police officer's duties in maintaining the public order. . . . That authority carries with it the risk of abuse. The danger that an officer will commit a sexual assault while on duty arises from the considerable authority and control inherent in the responsibilities of an officer in enforcing the law." (*Id*. at pp. 217, 218.)

Mary M. stressed that its conclusion "flows from the unique authority vested in police officers. Employees who do not have this authority and who commit sexual assaults may be acting outside the scope of their employment as a matter of law." (*Mary M*., *supra*, 54 Cal.3d at p. 218, fn. 11.) *Mary M*. also distinguished the out-of-state cases that had rejected vicarious liability for sexual assaults by private security guards, observing that because private security guards "do not act as official representatives of the state, any authority they have is different from, and far less than, that conferred upon

an officer of the law." (*Id*. at p. 219.) Subsequent courts have restricted *Mary M*. to its facts and its public policy rationale. (See *Lisa M., supra*, 12 Cal.4th at p. 304; *Farmers Ins. Group, supra*, 11 Cal.4th at pp. 1012-1013; *Mary M., supra*, 54 Cal.3d at p. 207; *Hoblitzell v. City of Ione* (2003) 110 Cal.App.4th 675, 685; *Doe I v. City of Murrieta* (2002) 102 Cal.App.4th 899, 909-910; *Maria D. v. Westec Residential Security, Inc*. (2000) 85 Cal.App.4th 125, 146.)

Mary M.'s exceptional application of the respondeat superior doctrine is not applicable to Kadah's acts. Simply wearing a uniform did not vest him with the same sweeping coercive authority over the citizenry as a whole as is vested in a publicly employed police officer who is an official representative of the state. If it did, any uniformed employee authorized to determine admission to a building, e.g., parking lot attendant, ballpark ticket taker, would be so vested.

Respondeat Superior Doctrine and Negligence

Plancarte contends there are triable issues of fact regarding Guardsmark's vicarious liability for Kadah's negligence. She argues that, even if his sexual assault could only be construed as intentional, she alleged acts that could be construed as negligence, to wit: he pushed her into the bathroom wall when another person knocked at the bathroom door and then followed her through the building and down a stairway where she fell.

We disagree. These other alleged acts may not be sexual in nature, but they still constitute the intentional tortious acts of assault and battery. Whether Kadah's tortious conduct is characterized as sexual assault, or assault and battery, or mere negligent pushing and chasing of Plancarte, the scope-of-employment limitation of the respondeat superior doctrine applies equally to preclude imposing vicarious liability on Guardsmark.

Plancarte points to Kadah's version of the episode in her effort to establish factual questions as to Guardsmark's vicarious liability for Kadah's negligence. As noted, page 5 *ante*, Kadah told his supervisor, Graves, and Guardsmark's private investigator that he "burst" into the bathroom, "startled" Plancarte, put his hand on her shoulder to "comfort"

her because she was scared and upset, and, when he left the bathroom to help another building employee with a key, she ran from the bathroom down the hallway.

Plancarte did not allege a cause of action against Kadah for negligence until she filed her second amended complaint.[2] Adapting the content of Graves's interview notes and the private investigator's report, the negligence cause of action alleged that Kadah knew or should have known that Plancarte was cleaning the bathroom and that he "negligently and carelessly burst unannounced" into the bathroom she was cleaning "and frightened her to such a degree that she became fearful she would be harmed." This cause of action further alleged: "Feeling she was in danger, Plancarte fled the restroom attempting to escape from the danger she perceived as a result of [Kadah's] abrupt and negligent behavior," and as a result of his negligence, she suffered the injuries to her back and ankle that she sustained in her fall down the stairs.

The clear import of the allegations in the negligence cause of action is that although Kadah may have negligently frightened her, he never actually assaulted or attempted to assault her in any way. She ran away from him only because his sudden entrance into the bathroom had scared her.

For purposes of argument, we accept that a security guard has a duty not to rush into a bathroom when he knows it is being cleaned because it is foreseeable that

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[2] On March 8, 2001, attorney James Dal Bon filed the initial complaint on Plancarte's behalf. Sometime before January 14, 2002, Steven Derby, another attorney from the same office took over from Dal Bon.

On June 17, 2002, Guardsmark filed its motion for summary judgment. On July 10, 2002, at Guardsmark's request, Derby filed a first amended complaint on Plancarte's behalf. The first amended complaint simply removed Guardsmark as a direct defendant in the causes of action for assault and battery. On July 26, 2002, trial was continued from August 16 to December 13, 2002. On August 15, 2002, Derby filed Plancarte's opposition to Guardsmark's summary judgment motion. Graves's interview notes and the investigator's report were among the documents used in opposition to the motion.

On September 27, 2002, Derby, on Plancarte's behalf, sought leave to file the second amended complaint. He declared that while researching and investigating the opposition to Guardsmark's summary judgment, he "uncovered" Graves's interview notes and case law that suggested Kadah's version of the events would support a cause of action for negligence against him and, vicariously, against Guardsmark. The second amended complaint was filed October 9, 2002.

doing so would frighten the janitor to such a degree as to create a risk of harm in the janitor's response to the perceived danger. In other words, Plancarte alleged sufficient facts in her second amended complaint for a negligence cause of action against Kadah, and, by extension, Guardsmark as his employer.

Nevertheless, Guardsmark met its burden of showing that Plancarte could not establish a cause of action for negligence based on Kadah's "sudden entrance" and her "fright." Guardsmark supported its motion for summary judgment with Plancarte's deposition, in which she stated Kadah "attacked" her as she was cleaning the bathroom; specifically, he grabbed her breasts from behind and tried to kiss and bite her. In her declaration in opposition to Guardsmark's motion, she stated that Kadah "attacked" and "assaulted" her in the bathroom. In her response to Guardsmark's separate statement of undisputed facts she agreed that her contention that Kadah sexually assaulted her in the men's bathroom while on the job as a security guard was "undisputed."

When a plaintiff makes a clear and unequivocal admission during deposition, courts are "forced" to conclude there is no substantial evidence of the existence of a triable issue of fact. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21.) Admissions against interest have a very high credibility value, particularly when they are obtained "not in the normal course of human activities and affairs but in the context of an established pretrial procedure whose purpose is to elicit facts." (*Id*. at p. 22.) Not only does Plancarte's deposition testimony establish that Kadah sexually assaulted her, her own sworn declaration and her response to Guardsmark's separate statement corroborate her deposition admissions. This evidence refutes the allegation in her second and operative complaint that Kadah did not actually assault her but frightened her so severely that she panicked and ran.

Once Guardsmark met its burden, the burden shifted to Plancarte to set forth the specific facts showing that a triable issue of material fact existed as to her negligence cause of action; she could not simply rely on her allegations. (Code Civ. Proc., § 437c, subd. (o)(2); *Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 476-477.) Plancarte presented no affidavits or other evidence to counter the evidence proffered by

Guardsmark. Consequently, there was no triable issue of material fact as to her negligence cause of action.

Negligent Hiring and Supervision

Plancarte contends there are triable issues of fact as to Guardmark's negligent hiring and supervision of Kadah because it failed to follow many of its own hiring practices and because his Minnesota Multiphasic Personality Inventory 2 (MMPI-II) was evidence of his sexual deviancy.

An employer may be liable to a third person for negligently hiring or supervising an unfit employee. (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054.) Liability results when the employer "antecedently had reason to believe that an undue risk of harm would exist because of the employment. . . ." (*Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1214.) However, an employer's duty is breached only when the employer knows, or should know, facts that would warn a reasonable person that the employee presents an undue risk of harm to third persons in light of the work to be performed. (*Ibid*.)

A defendant's negligence is usually a question of fact, but it may be determined as a matter of law where a reasonable factfinder could draw only one conclusion from the evidence presented. (*Federico v. Superior Court, supra,* 59 Cal.App.4th at p. 1214.)

Nothing in the evidence here implies Guardsmark acted unreasonably in hiring Kadah as a security guard for 135 Commonwealth. Before hiring him in 1997 and again in 1998, Guardsmark conducted a total of nine reference checks; they revealed no adverse information about Kadah, and specifically no mental disorders or institutionalizations. It obtained five notarized statements from people who knew him during the 10 years prior to his Guardsmark employment all declaring he was not known to have been arrested, incarcerated or institutionalized. Kadah agreed in writing as a condition of employment to adhere to Guardsmark's written Code of Ethics forbidding offensive sexual remarks or conduct. He agreed in writing to adhere to its written policy that any kind of sexual harassment, including "unwelcome physical contact such as hugging, assaulting, or grabbing," was both illegal and against company policy. The California Department of

Justice confirmed that he had no arrest record. The California Department of Consumer Affairs, Bureau of Security and Investigative Services confirmed that he met all criteria for registration with the Bureau as a security guard.

Most importantly, in the approximately three years Kadah had worked as a Guardsmark employee before his assignment to 135 Commonwealth, Guardsmark received no reports of inappropriate behavior by him. The sole complaint had concerned his thick accent.

Nothing in this evidence implies that Guardsmark had or should have had any "antecedent knowledge" that Kadah posed the particular risk of assaulting authorized occupants of a building he was assigned to guard.

Plancarte argues that if Guardsmark had conducted a more thorough background check it would have discovered discrepancies in his documentation, e.g., two social security numbers, claim for unemployment benefits based on termination, different birthdates for his wife, that would have put it on notice he was untrustworthy. Knowledge that Kadah's documentation contained inconsistencies regarding personal identification details does not equate with knowledge that he would commit sexual or nonsexual assaults of a building occupant. (See *Doe v. Capital Cities, supra*, 50 Cal.App.4th at p. 1054: employer's knowledge that an employee had personally used mind-altering drugs is not the same as knowledge he would surreptitiously drug and sexually assault a job applicant.)

Plancarte also argues the results of Kadah's MMPI-II put Guardsmark on notice that he had lawless tendencies and was a sexual deviant.

Guardsmark gives all new employees the MMPI-II as an evaluative placement tool. Because it contains questions that can disclose physical or mental disability, Guardsmark administers it only after extending a valid employment offer to avoid violation of the Americans with Disabilities Act. Guardsmark has been advised that the Act prohibits the use of medically-related questions that could disclose a physical or mental disability prior to extending a bona fide employment offer and also prohibits

discrimination against employees with physical or mental disabilities in making decisions to hire or fire them.

Before rehiring Kadah in 1998, a Guardsmark human resources specialist notified Dr. Robert Overman[3] that the MMPI-II Kadah had taken after being hired in 1997 was "flagged for a re-test (R-T-1)," and she had "complete faith that his retest will result in an acceptable score." According to Dr. Overman, an "R-T-1" notation indicates a person who is trying to make himself appear more favorable or make a greater impression of himself "than was probably realistically true of anyone." Kadah was given MMPI-II again after being rehired in 1998.

Plancarte supported her opposition to Guardsmark's motion for summary judgment with a declaration by clinical psychologist Melvin Rabeck. He declared: law enforcement and security personnel employers use the MMPI-II as part of a comprehensive screening of abnormal, harmful and dangerous behavioral disorders including poor impulse control, anti-social behavior, and psychopathic deviations. The test creators have formulated interpretive scales to use in evaluating law enforcement and security applicants. The MMPI-II also contains a "lie" scale designed to screen test takers who deliberately misrepresent themselves to the test administrator.

Dr. Rabeck further declared: his rescoring of Kadah's 1997 answer sheet showed a "lie" scale so high that it indicated extreme defensiveness and possibly poor impulse control, uncooperativeness and poor reliability; consequently, it was impossible to trust Kadah's scores on the other scales. He also examined Kadah's responses to individual questions that could concern a security guard employer. He detected aggressiveness, psychopathic deviance, and antisocial practices from some of Kadah's answers.[4] Based on the test, he did not believe Kadah should have been hired as a security guard without,

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[3] According to Plancarte, and not disputed by Guardsmark, Dr. Overman is in charge of scoring employees' MMPI-II examinations for Guardsmark.

[4] Dr. Rabeck referred specifically to Kadah's "true" responses to the following statements posed by the test: "It would be better if most laws were thrown away;" "I wish I were not bothered by thoughts about sex;" "I got many beatings as a child; and "Most married couples do not show much affection for each other." He also noted Kadah's failure to respond at all to the test statement "Sometimes I enjoy hurting persons I love."

at least, further testing. He did not believe the results of Kadah's 1998 MMPI-II could be trusted because the results on retest can be tainted by the test-taker's familiarity with the questions and possible coaching. He believed Kadah had been coached because he changed his previous unfavorable answers and because the human resources specialist predicted he would pass if he took the test again. He also believed the second test showed Kadah as having an abnormally high "lie" scale, which indicated he was still defensive and probably trying to hide unfavorable personality traits. He opined that Kadah's two MMPI-II tests, taken together, clearly indicated he should not be hired as a security guard without further interviews and testing because of the abnormally high "lie" scale, which indicated unreliability, possible poor impulse control, and undesirable personality traits that could pose a danger to the public, including lawlessness, violence, antisocial behavior, sexual deviance and poor reality testing.

To establish a triable issue of material fact, a plaintiff responding to a defendant's motion for summary judgment must produce "substantial responsive evidence." (S*angster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.) Responsive evidence that gives rise only to speculation, conclusions, and conjecture is not substantial and does not suffice to establish a triable issue. (*Ibid*.; *Lee v. Crusader Ins. Co*. (1996) 49 Cal.App.4th 1750, 1756.) Dr. Rabeck's analysis of Kadah's tests is only speculative as to his possible future behavior as a security guard. It is not, for example, comparable to the specific facts known to the employer in *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828 (*Evan F*.).

In *Evan F*., a church pastor molested a 13-year-old boy. (*Evan F*., *supra*, 8 Cal.App.4th at p. 832.) Before it hired him, the church had reason to know the pastor had previously agreed with the larger church conference to "step down" after complaints of molestation by several adolescent males. (*Ibid*.) The church also had reason to know that the pastor had recently been fired as a secular high school counselor for inappropriate behavior with an adolescent male. (*Ibid*.) The church hired him first as a youth counselor, then as a pastor where he served as the victim's Sunday school teacher. Both positions regularly entrusted him with care and supervision of minors, sometimes outside

the presence of other people. (*Id*. at pp. 832-833.) *Evan F*. held that this specific factual history was sufficient to permit the plaintiff to state a cause of action for negligent hiring for failure to investigate or make any inquiry regarding the pastor's fitness to serve his positions. (*Id*. at p. 833.)

In *Evan F*. the facts about the pastor's history known or knowable to the employing church encompassed the particular risk of harm in the context of the job the pastor was hired for: molestation of male adolescents assigned to his charge when others were not present. Unlike *Evan F*., Dr. Rabeck's sweeping, generalized conclusions about Kadah's personality based on the standardized MMPI-II do not demonstrate that Kadah posed an undue risk of committing criminal sexual assaults on a building's permitted female occupants if he were employed as the building's security guard. Dr. Rabeck's conclusions are too speculative to establish a triable issue of material fact regarding negligent hiring or supervision.

We conclude that before Guardsmark learned of the assault against Plancarte, the facts known or available to it did not, as a matter of law, make its decision to hire Kadah as an unsupervised security guard for 135 Commonwealth unreasonable.

Motion for New Trial

Plancarte contends the trial court abused its discretion in denying her motion for new trial on the grounds of newly-discovered evidence that would demonstrate that Guardsmark ratified Kadah's wrongful acts.

A trial court's broad discretion in ruling on a motion for new trial is accorded great deference on appeal. (*Sherman v. Kinetic Concepts, Inc*. (1998) 67 Cal.App.4th 1152, 1160 (*Sherman*).) However, particularly when reviewing an order denying a new trial, the appellate court is required to review the entire record to determine independently whether the error on which the new trial motion is based is prejudicial. (*Id*. at pp. 1160, 1161.)

Code of Civil Procedure section 657, subdivision 4, authorizes the grant of a new trial when the moving party has discovered new, material evidence which it could not, with reasonable diligence, have discovered and produced at trial. The moving party must

establish (1) the evidence is newly discovered; (2) he or she exercised reasonable diligence in discovering and producing it; and (3) it is material to the moving party's case. (*Sherman*, *supra*, 67 Cal.App.4th at p. 1161.)

Plancarte moved for new trial based on the newly discovered evidence that Guardsmark had paid for Kadah's defense in the instant case. She argued that in so doing Guardsmark ratified Kadah's conduct because it knew he had pled nolo contendere to a misdemeanor sexual battery by the time he answered Plancarte's civil complaint.[5]

In support of her motion Plancarte's attorney, Steven Derby, declared: the trial court granted summary judgment for Guardsmark on December 9, 2002. On December 10 he propounded discovery on Kadah, who remained a defendant in the action, through Kadah's attorney, Marc Eisenhart.[6] On December 18 Eisenhart, by telephone, asked for an extension of time to respond. During the telephone conversation Eisenhart initially volunteered that he was withdrawing as Kadah's attorney because Guardsmark would no longer be paying his fees. Later in the conversation Derby specifically asked him if Guardsmark was paying him to defend Kadah in the civil action; he denied it was. Following this conversation Derby noticed Eisenhart's deposition because he was unsatisfied with Eisenhart's answer about fee payments.

Derby further declared that at his January 16, 2003 deposition Eisenhart produced a letter to him from attorney Dean Robinson of Low, Ball & Lynch, the firm representing Guardsmark. The letter, dated June 5, 2001, confirmed that Robinson had "advised [Eisenhart by telephone that day] that Guardsmark has authorized your representation for Mr. Kadah. [¶] Pursuant to the payment agreement, you will submit your bills for services to our office. Our office will be responsible for payment of same, and we will receive reimbursement from Guardsmark. . . . [¶] I look forward to meeting with you to discuss our mutual defense of this claim." During his deposition Eisenhart acknowledged that since June 2001, he had submitted his bills for representing Kadah to Low, Ball &

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5 On November 6, 2000, Kadah entered a plea of nolo contendere to Penal Code section 243.4, subdivision (d)(1), unwanted touching of intimate part of another person for purpose of sexual gratification (since renumbered to section 243.4, subdivision (e)(1)).

6 Eisenhart also represented Kadah during the criminal proceedings.

Lynch, and received payment from the firm. Eisenhart also stated at the deposition that he understood Guardsmark and Low, Ball & Lynch would continue to pay him for defending Kadah, the remaining defendant in Plancarte's civil action.

Guardsmark opposed the motion on the grounds (1) Plancarte provided no evidence that the "newly discovered evidence" of ratification could not have been discovered before her August 2002 opposition to Guardsmark's motion for summary judgment, given the July 2001 filing of Kadah's answer ; (2) she did not show that the newly discovered evidence was material, i.e., would likely change the result ; and (3) the evidence in support of Plancarte's ratification conclusion--Eisenhart's deposition testimony and Robinson's June 5, 2001 letter--were inadmissible hearsay, but even if admissible, this evidence did not support a finding that Guardsmark ratified Kadah's alleged wrongful actions.

We conclude the court did not abuse its discretion in denying the motion for new trial. As Guardsmark correctly argues, Plancarte's proffered evidence that it ratified Kadah's wrongful acts is inadmissible hearsay. Plancarte's principal evidence of ratification was Robinson's letter to Eisenhart confirming their agreement that Eisenhart should submit his bills for defending Kadah in the civil action to Low, Ball & Lynch. This letter, as an out-of-court statement to prove the truth of her assertion that Guardsmark ratified Kadah's acts, falls within the definition of the hearsay rule (Evid. Code, § 1200), and Plancarte has not argued any exception.

In any case, Guardsmark's payment of Kadah's attorney fees does not logically constitute its ratification of his wrongful acts. Under the circumstances it reasonably implies a sound business decision following a risk/benefit analysis. Kadah's conviction by plea of nolo contendere to a misdemeanor could not be used against him as an admission in the civil suit based on that act. (Pen. Code, § 1016.) Thus, whether Kadah had committed acts that amounted to a civil assault had to be proved anew in Plancarte's civil action. If Kadah could show his acts were not tortious, no liability would attach to Guardsmark at all, under either the respondeat superior doctrine or for negligent hiring/supervision. It was therefore in Guardsmark's interest that he have adequate and

reliable representation. If Kadah were not individually represented, there could be a greater likelihood of poor self-representation or default, making Guardsmark's defense of the case significantly more difficult. The fact that Guardsmark pursued and ultimately prevailed on an alternate defense theory--nonliability under respondeat superior for an employee's sexual assault--did not restrict it from having all available defenses well advocated.

Additionally, Labor Code section 2802 requires an employer to "indemnify his employee for all that the employee necessarily expends or loses in direct consequence of the discharge of his duties. . . ." This statute obligates the employer not only to pay any judgment entered against the employee for conduct arising out of his employment but also to defend an employee sued by a third person for such conduct. (*Jacobus v. Krambo Corp*. (2000) 78 Cal.App.4th 1096, 1100; *Douglas v. Los Angeles Herald-Examiner* (1975) 50 Cal.App.3d 449, 461.) Unlike an insurer, the employer is not mandated to defend the employee whenever there is a potential for liability. "However, if the employer elects to run a risk and refuses to defend, the employer must indemnify the employee for his attorney fees and costs in defending the underlying action if the employee was sued for acts within the scope of his employment. [Citation.]" (*Jacobus,* at p. 1100.)

Acts necessary for an employee's comfort and health while at work, even though personal and not direct acts of service to his employer, do not take the employee outside the scope of his employment. (*Jacobus, supra*, 78 Cal.App.4th at p. 1102.) Using the bathroom during a workshift is such a necessary act, and it is undisputed that Kadah was permitted to do so during his shift. Plancarte's action against Kadah was based on conduct that occurred while he was engaged in such a permitted necessary act. Although the nature of Kadah's conduct against her, as alleged in her complaint, would place it outside the scope of his employment, there was no certainty that Plancarte would succeed in proving her allegations. She could not use Kadah's criminal conviction against him as an admission of wrongful acts, and Guardsmark's own investigation by both Graves, Kadah's supervisor, and its private investigator concluded that Kadah had not behaved as

she claimed. Given the reasonable possibility that a jury could find that Kadah's conduct toward Plancarte while performing acts for his personal comfort during the course of his employment was not tortious, Guardsmark could understandably elect to provide him a defense rather than await the outcome of the trial. By paying for Kadah's attorney, Guardsmark would not only satisfy a statutory duty, it would, potentially, decrease the risk of the financial exposure it could face if Kadah could not present a competent defense for lack of counsel.

Plancarte relies principally on *Hale v. Farmers Ins. Exch.* (1974) 42 Cal.App.3d 681 (*Hale*) to support her ratification argument. In *Hale* an insurance company and two local employees were sued for bad faith refusal to pay benefits under an automobile policy. (*Id*. at p. 686.) The jury awarded punitive damages against the insurance company. (*Ibid*.) The trial court granted the company's motion for new trial on the grounds there was insufficient evidence it authorized or ratified the wrongful acts of the individual defendants. (*Id*. at p. 694, fn. 1.)

In affirming the order for new trial, *Hale* first recited what it identified as a "proper statement of law," quoting *Ralphs v. Hensler* (1893) 97 Cal. 296, 303: "'Where an agent is authorized to do an act, and he transcends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has been thus done in his name, . . . else he will be bound by the act as having ratified by implication.'" *Hale* concluded that this "proper statement of the law must fail" under the circumstances of the case. As it observed, the trial court could reasonably infer there was no evidence that an officer of sufficient power to bind the company was fully informed of all material facts regarding the individual defendants' wrongful acts when the insurance company's unverified answer, denying their wrongful acts and asserting affirmative defenses, was filed. (*Hale*, *supra*, 42 Cal.App.3d at pp. 697-698.)

Hale also noted that "where a defense is maintained based upon the transaction as the agent was authorized to conduct it, [the] principal does not ratify the unauthorized transaction, although he knows the third person claims the transaction included . . . unauthorized acts." Because the insurance company withdrew its affirmative defenses

after discovering the facts did not support them, and stood "merely" on a general denial that admitted only an agency relationship with the individual defendants and a valid insurance policy, "it cannot be said [the insurance company] was ratifying unauthorized acts." (*Hale*, *supra*, 42 Cal.App.3d at pp. 698-699.)

We decline to read *Hale* as standing for the rule that an employer who has been informed of the material facts regarding an employee's alleged tortious acts and still provides a defense for the employee has, ipso facto, ratified those acts and made itself potentially liable for them. First, *Hale's* source for a "proper statement of the law" regarding implied ratification absent repudiation, the 1893 *Ralphs v. Hensler* opinion, is questionable. *Ralphs v. Hensler* preceded the 1937 enactment of Labor Code section 2802, which obligates an employer to defend an employee sued for conduct arising out of his employment. Until the underlying action against the employee is resolved, the employer cannot be deemed "'fully informed'" of what was done in the employer's name. (*Hale, supra*, 42 Cal.App.3d at p. 697, quoting *Ralphs v. Hensle, supra,* 97 Cal. 296.)

Second, *Hale* was proceeding from a different procedural posture. It had to determine whether the trial court had stated sufficient reasons for concluding there was insufficient evidence to support the jury's award of punitive damages and thus did not abuse its discretion in granting a new trial. The issue before us is whether the trial court abused its discretion in denying a new trial on the grounds of newly discovered evidence if the trial court could reasonably conclude that evidence was either inadmissible and/or not material, i.e., not probable to have changed the result. (Code Civ. Proc., § 657(4); *Sherman v. Kinetic Concepts, Inc*., *supra*, 67 Cal.App.4th at p. 1161.)

Plancarte also relies on *Alhino v. Starr* (1980) 112 Cal.App.3d 158 (*Alhino*), in which a real estate brokerage and its individual employee were sued for fraudulent misrepresentation in a real estate transaction. (*Id*. at pp. 163, 167.) On appeal from a judgment in favor of the plaintiff, the brokerage argued there was insufficient evidence that it had ratified the unlawful conduct of its employee. (*Id*. at p. 173.) In affirming the judgment, *Alhino* made the bald statement, "The assertion of defense alone demonstrates

ratification of the employee's conduct," citing *Hale* without discussion. As discussed above, we question that *Hale* can stand for such an absolute rule. In any case, the evidence in *Alhino* also demonstrated that the employee had fully informed his employer of his fraudulent acts and, after leaving the brokerage's employ,[7] was rehired before trial. (*Alhino*, *supra*, 112 Cal.App.3d at p. 173.)

Here, Kadah denied any wrongful acts to Guardsmark and, insofar as he pled nolo contendere, did not admit wrongful acts via a guilty plea. Guardsmark also suspended Kadah immediately after the incident and terminated him after the criminal conviction , evidence that militates against ratification of the acts he allegedly committed.

DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

_____

Stevens, J.

_____

Simons, J.

[7] It is unclear in the opinion whether the employee left voluntarily or was dismissed.

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

EVEILIA PLANCARTE, **Plaintiff and Appellant,** **v.** **GUARDSMARK, LLC.,** **Defendant and Respondent.**	**A102152** **(Alameda County Super. Ct. No. H2187325)**

ORDER MODIFYING OPINION AND CERTIFYING OPINION FOR PARTIAL PUBLICATION

BY THE COURT:

The opinion in the above-entitled matter filed on April 14, 2004, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be partially published in the Official Reports, and it is so ordered. Pursuant

to California Rules of Court, rules 976(b) and 976.1, the DISCUSSION sections entitled "Standard of Review," "Respondeat Superior Doctrine and Intentional Torts," "Respondeat Superior Doctrine and Negligence," and "Negligent Hiring and Supervision," are not certified for publication.

It is further ordered that the opinion be modified as follows:

1. The third sentence of the second paragraph on page 18, which begins, "This letter, as an out-of-court statement . . . ." is deleted in its entirety and replaced with the following sentences:

"This letter was an out-of-court statement offered to prove the truth of her assertion that there was an agreement, which provided circumstantial evidence Guardsmark ratified Kadah's acts. As such it falls within the definition of the hearsay rule (Evid. Code, § 1200), and Plancarte has not argued any exception."

2. This modification does not effect a change in the judgment.

Trial court:	Alameda County Superior Court
Trial judge:	Hon. Kenneth Mark Burr
Counsel for plaintiff and appellant:	Steven L. Derby, Esq. The Derby Law Firm
Counsel for defendant and respondent:	Dean M. Robinson, Esq. Guy W. Stilson, Esq. Low, Ball & Lynch